

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF PUERTO RICO

3 LILIANA RODRIGUEZ CANET,

4 Plaintiff,

5 v.

6 MORGAN STANLEY & CO., et al.,

7 Defendants.

8 CIVIL NO. 04-1986 (RLA)

9

10 **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**
AND DISMISSING THE COMPLAINT AS TIME-BARRED

11 Codefendant MORGAN STANLEY DW INC. ("MORGAN STANLEY") has moved
12 the court to dismiss the instant complaint as untimely filed. In the
13 alternative, movant petitions the court to refer this matter to
14 arbitration. The court having reviewed the memoranda filed by the
15 parties hereby finds that the claims asserted are time-barred.

16 The complaint asserts violations to various securities
17 provisions including sec. 10(b) of the Securities Exchange Act of
18 1934,¹ 15 U.S.C. § 78j(b) and Rule 10b-5 of the Securities and
19 Exchange Commission, 17 C.F.R. § 240.10b-5. According to the
20 complaint, defendants purportedly violated securities laws by
21 purchasing unsuitable securities in disregard of her interests and
22 lack of investment sophistication.

23

24

25 ¹ Violations to secs. 15(c)(1)-(2) and 20 of this statute, 15
26 U.S.C. §§ 78o(c)(1) and 78t respectively are also claimed.
Additionally, the complaint cites sec. 17(a) of the Securities Act of
1933, 15 U.S.C. § 77q(a).

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3 THE FACTS

4 The following facts are deemed true for purposes of this Order.

- 5 1. On February 24, 1987 plaintiff, LILIANA RODRIGUEZ CANET and
6 her mother, MERCEDES C. RODRIGUEZ, opened a joint account
7 with MORGAN STANLEY.
- 8 2. Codefendant RAUL A. BENAVIDES was the financial advisor at
9 MORGAN STANLEY assigned to handle the aforementioned
10 account.
- 11 3. On September 24, 1999 a Variable Annuity was purchased in
12 plaintiff's account.²
- 13 4. As reflected in the monthly account statements issued at
14 the end of each month, commencing on December 2000 through
15 August 2001 plaintiff's account decreased close to 40% of
16 its initial value as follows:³

Date	Value
12/00	\$99,521.65
1/01	93,040.15
2/01	83,132.43
3/01	76,355.35
4/01	78,804.45
5/01	77,088.03

25 ² Plaintiff denies having authorized this purchase.

26 ³ Plaintiff claims she did not receive the account monthly
statements.

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6/01	74,336.13
7/01	70,061.19
8/01	65,330.17
9/01	61,549.25

5. The complaint in this action was filed on September 22,
6. 2004.

7. At the time the aforementioned account was opened,
8. plaintiff executed an Agreement which, in relevant part,
9. reads as follows:

I agree and you agree by carrying any
account in which I have an interest
that all controversies between me and
you or your agents, representatives or
employees arising out of or concerning
any such account, any transactions
between us or for such accounts, or
the construction, performance or
breach of this or any other agreement
between us, whether entered into
prior, or subsequent to the date below
shall be determined by arbitration in
accordance with the rules of the
National Association of Securities

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Dealers, Inc. or the New York Stock Exchange, Inc. as I may elect.

SUMMARY JUDGMENT

Rule 56(c) Fed. R. Civ. P., which sets forth the standard for
ruling on summary judgment motions, in pertinent part provides that
they shall be granted "if the pleadings, depositions, answers to
interrogatories, and admissions on file, together with the
affidavits, if any, show that there is no genuine issue as to any
material fact and that the moving party is entitled to a judgment as
a matter of law." Sands v. Ridefilm Corp., 212 F.3d 657, 660-61 (1st
Cir. 2000); Barreto-Rivera v. Medina-Vargas, 168 F.3d 42, 45 (1st Cir.
1999). The party seeking summary judgment must first demonstrate the
absence of a genuine issue of material fact in the record.
DeNovellis v. Shalala, 124 F.3d 298, 306 (1st Cir. 1997). A genuine
issue exists if there is sufficient evidence supporting the claimed
factual disputes to require a trial. Morris v. Gov't Dev. Bank of
Puerto Rico, 27 F.3d 746, 748 (1st Cir. 1994); LeBlanc v. Great Am.
Ins. Co., 6 F.3d 836, 841 (1st Cir. 1993), cert. denied, 511 U.S.
1018, 114 S.Ct. 1398, 128 L.Ed.2d 72 (1994). A fact is material if
it might affect the outcome of a lawsuit under the governing law.
Morrissey v. Boston Five Cents Sav. Bank, 54 F. 3d 27, 31 (1st Cir.
1995).

25 "In ruling on a motion for summary judgment, the court must view
26 'the facts in the light most favorable to the non-moving party,

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2 drawing all reasonable inferences in that party's favor.'" Poulis-
3 Minott v. Smith, 388 F.3d 354, 361 (1st Cir. 2004) (citing Barbour v.
4 Dynamics Research Corp., 63 F.3d 32, 36 (1st Cir. 1995)).

5 Credibility issues fall outside the scope of summary judgment.
6 "'Credibility determinations, the weighing of the evidence, and the
7 drawing of legitimate inferences from the facts are jury functions,
8 not those of a judge.'" Reeves v. Sanderson Plumbing Prods., Inc.,
9 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (citing
10 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505,
11 91 L.Ed.2d 202 (1986)). See also, Dominguez-Cruz v. Suttle Caribe,
12 Inc., 202 F.3d 424, 432 (1st Cir. 2000) ("court should not engage in
13 credibility assessments."); Simas v. First Citizens' Fed. Credit
14 Union, 170 F.3d 37, 49 (1st Cir. 1999) ("credibility determinations
15 are for the factfinder at trial, not for the court at summary
16 judgment."); Perez-Trujillo v. Volvo Car Corp., 137 F.3d 50, 54 (1st
17 Cir. 1998) (credibility issues not proper on summary judgment);
18 Molina Quintero v. Caribe G.E. Power Breakers, Inc., 234 F.Supp.2d
19 108, 113 (D.P.R. 2002). "There is no room for credibility
20 determinations, no room for the measured weighing of conflicting
21 evidence such as the trial process entails, and no room for the judge
22 to superimpose his own ideas of probability and likelihood. In fact,
23 only if the record, viewed in this manner and without regard to
24 credibility determinations, reveals no genuine issue as to any
25 material fact may the court enter summary judgment." Cruz-Baez v.
26

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3 Negron-Irizarry, 360 F.Supp.2d 326, 332 (D.P.R. 2005) (internal
4 citations, brackets and quotation marks omitted).

5 In cases where the non-movant party bears the ultimate burden of
6 proof, he must present definite and competent evidence to rebut a
7 motion for summary judgment, Anderson v. Liberty Lobby, Inc., 477
8 U.S. at 256-257, 106 S.Ct. 2505, 91 L.Ed.2d 202; Navarro v. Pfizer
9 Corp., 261 F.3d 90, 94 (1st Cir. 2000); Grant's Dairy v. Comm'r of
10 Maine Dep't of Agric., 232 F.3d 8, 14 (1st Cir. 2000), and cannot rely
11 upon "conclusory allegations, improbable inferences, and unsupported
12 speculation". Lopez-Carrasquillo v. Rubianes, 230 F.3d 409, 412 (1st
13 Cir. 2000); Maldonado-Denis v. Castillo-Rodríguez, 23 F.3d 576, 581
14 (1st Cir. 1994); Medina-Muñoz v. R.J. Reynolds Tobacco Co., 896 F.2d
15 5, 8 (1st Cir. 1990).

16 **TIMELINESS**

17 In essence, plaintiff asserts two different claims under sec.
18 10(b): one for the alleged unsuitability of the investments and the
19 other for the alleged unauthorized purchase of investments.

20 In 1991 the U.S. Supreme Court ruled that claims asserted under
21 sec. 10(b) "must be commenced within one year after the discovery of
22 the facts constituting the violation and within three years after
23 such violation." Lampf, Pleva, Lipkind, Prupis & Petigrow v.
24 Gilbertson, 501 U.S. 350, 364, 111 S.Ct. 2773, 115 L.Ed.2d 321
25 (1991). See also, Young v. Lepone, 305 F.3d 1, 8 (1st Cir. 2002).

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2 Further, if fraudulent concealment is present, the one-year
3 limitations period will accrue "when the plaintiff in the exercise of
4 reasonable diligence discovered or should have discovered the fraud
5 of which he complains." *Id.* (citing Cooperativa de Ahorro y Credito
6 Aguada v. Kidder, Peabody & Co., 129 F.3d 222, 224 (1st Cir. 1997)).
7 "When telltale warning signs augur that fraud is afoot, however, such
8 signs, if sufficiently portentous, may as a matter of law be deemed
9 to alert a reasonable investor to the possibility of fraudulent
10 conduct." *Id.*

11 In making this assessment the court must initially determine
12 whether sufficient signs were present to alert a reasonable investor
13 of the possibility of fraud. If so, it must then ascertain whether
14 plaintiff's response thereto was diligent under the circumstances.
15 "The first step in the pavane requires a reviewing court to ascertain
16 whether, when, and to what extent, storm warnings actually existed in
17 a given situation... [which] would lead a reasonable investor to
18 check carefully into the possibility of fraud... The next step
19 requires the court to assay whether, once sufficient storm warnings
20 were apparent, the investor probed the matter in a reasonably
21 diligent manner." *Id.*

22 The longer period, i.e., 3 years, however, is fatal and is not
23 subject to extensions. "Because the purpose of the 3-year limitation
24 is clearly to serve as a cutoff, we hold that tolling principles do
25 not apply to that period." Lampf, 501 U.S. at 363.
26

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In 2002 Congress enacted the Sarbanes-Oxley Act,⁴ 28 U.S.C. § 1658(b), adopted in response to corporate scandals which, *inter alios*, extended the one-and three-year limitations provided for in Lampf to a two and five-year term for claims based on securities fraud. The Sarbanes-Oxley Act has been found applicable to private claims arising in fraud under sec. 10(b). In re: Alstom SA Sec. Lit., 406 F.Supp.2d 402 (S.D.N.Y. 2005); In re: Exxon Mobil Oil Corp. Sec. Lit., 387 F.Supp.2d 407 (D.N.J. 2005).

The statute, in pertinent part, reads:

(b) [A] private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(47) may be brought no later than the earlier of-

(1) 2 years after the discovery of the facts constituting the violation; or

(2) 5 years after such violation.

The extended limitations period went into effect on July 30, 2002. The statute further provided that it would "apply to all proceedings... that... commenced on or after the date of [its]

⁴ Formally known as the Public Company Accounting and Investor Protection Act of 2002.

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3 enactment [**July 30, 2002**]". Pub.L. 107-204, Title VII, § 804(b), July
4 30, 2002 (note following § 1658).

5 The longer period benefits claims accrued prior to July 30, 2002
6 but not yet extinguished as of that date. That is, the extended
7 period does not revive claims for which the one-and three-year limit
8 had already expired at the time the statute went into effect. It does
9 not "resurrect[] moribund securities claims." Lieberman v. Cambridge
10 Partners, L.L.C., 432 F.3d 482, 487 (3rd Cir. 2005). See also, In re:
11 ADC Telecomm., Inc. Sec. Lit., 409 F.3d 974 (8th Cir. 2005)
12 ("Sarbanes-Oxley Act does not apply retroactively to revive claims on
13 which the prior statute of limitations had run"); In re: Alstom SA
14 Sec. Lit., 406 F.Supp.2d at 422 (claims barred prior to July 30, 2002
15 "will not be revived by looking to the lengthened limitations period
16 stated in [§ 1658(b)]."); In re: Exxon Mobil Oil Corp. Sec. Lit., 387
17 F.Supp.2d at 416 (Act not to be applied retroactively "and does not
18 revive claims that were time-barred prior to its enactment.")

19 Hence, we must first determine the status of plaintiff's claims
20 at the time the amendment went into effect.

21 Defendant initially contends that the claim based on the
22 purchase of the Variable Annuity is stale under the three-year
23 statute of repose. The Variable Annuity with enhanced death benefits
24 was purchased on **September 24, 1999** and the complaint filed on
25 **September 22, 2004**.

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3 Additionally, MORGAN STANLEY argues that by **August 2001** the
4 steady and drastic reduction in plaintiff's investment portfolio
5 constituted sufficient "storm warnings" to trigger her duty of
6 "diligent inquiry". Hence, the complaint filed over three years
7 thereafter was untimely for both the Variable Annuity as well as the
8 allegation that the transactions in her account were unsuitable.

9 Plaintiff's response to defendant's argument is simple. She
10 never received the monthly statements. Thus, plaintiff claims that
11 she was not alerted to the purportedly fraudulent scheme in order to
12 trigger her duty to further inquire into the matter. Plaintiff also
13 alleges that she first received copy of the Variable Annuity document
14 in October 2003 when, upon her request, MORGAN STANLEY provided one.

15 We shall begin by addressing plaintiff's argument based on the
16 statute of repose. Taking **September 24, 1999** - the date when the
17 Variable Annuity was purchased - as the accrual date for the initial
18 three-year statute of repose, plaintiff's claim would have expired in
19 **September 2002**. That means that on **July 30, 2002**, when the Sarbanes-
20 Oxley Act went into effect this particular cause of action was still
21 alive by scarcely two months and, under the new 5-year statute of
22 repose timely filed in September 2004 by a matter of days.

23 Similarly, we must examine whether the claims asserted are
24 timely under the previous one-year limitation. According to defendant
25 plaintiff was put on inquiry notice regarding the unsuitable
26 investments at least by **August 2001** which would have required that

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2 the pertinent complaint be filed within a year therefrom, i.e., by
3 **August 2002**. Hence, this claim had not yet expired when the new
4 limitations period went into effect in **July 2002**.

5 **ACCRUAL**

6 At this stage we are called upon to decide whether, based on the
7 facts before us, plaintiff was indeed put on inquiry notice for both
8 of her claims - whether based on the purchase of an Variable Annuity
9 insurance in September 1999 as well as the mishandling of the
10 invested funds - at least two years prior to filing the complaint in
11 September 22, 2004.

12 We shall initially address plaintiff's contention that she never
13 received the monthly account statements issued by MORGAN STANLEY.
14 This is not to say that plaintiff did not have access to them or
15 opportunity to review them. Further, there is no allegation that the
16 statements were received at an address different from the one
17 provided by plaintiff and her mother when filling out their initial
18 account application or that she requested that an additional copy of
19 the statements be mailed directly to her and that these were not
20 provided. In effect, plaintiff is saying that she failed to examine
21 the status of her account during the more than 15 years that she held
22 it. It is elementary that any reasonable investor would take steps to
23 periodically ascertain the status of his/her account. Plaintiff
24 cannot merely sit back and hope for the best; she had at a minimum,
25 a duty to keep abreast of how her investments were performing.
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2 According to the complaint, the purpose of the account was for
3 plaintiff to seek a "stable source of income, thus the account was to
4 be managed in a conservative manner." ¶ 16. Hence, any reasonable
5 investor in plaintiff's position would have reacted when faced with
6 the steady and significant decline of her investment for a period of
7 close to a year when the account value dipped close to 40% of the
8 initial invested sums. See i.e., Munjak v. Signator Investors, Inc.,
9 316 F.Supp.2d 1086, 1092 (D.Kan.2004) ("[I]t does not require
10 sophisticated knowledge to discern that the money was invested in
11 different mutual funds than promised; that the money was invested
12 eight months faster than as promised; and, that the rate of return
13 was markedly different than promised"); Freundt-Alberti v. Merrill,
14 Lynch, Pierce, Fenner & Smith, Inc., 135 F.Supp.2d 1298 (S.D.Fla.
15 2001) (Account statement indicating investment in stocks as opposed
16 to bonds as per instructions, failure to send account statements to
17 postal address and concern over lack of increase in account's value
18 constitute ample "storm warnings" to trigger duty to investigate.)
19

20 In this regard we agree with defendant that at least by **August**
21 **2001** there were enough "storm warnings" to trigger plaintiff's duty
22 of "diligent inquiry". However, it is not until **September 2004**, that
23 is, over three years later, that this suit was filed.

24 With respect to the purchase of the \$16,000.00 Variable Annuity,
25 the transaction was first notified in the September 30, 1999 monthly
26 account statement. This particular investment appears as a separate

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3 category from plaintiff's other assets and is clearly itemized as
4 "Annuities/Insurance" in every single statement issued in plaintiff's
5 account commencing in September 1999. Thus, any reasonable investor
6 would have been prompted to inquire as to the nature of its purchase
7 by a mere reading of this item. Further, the Variable Annuity was
8 losing its value along with the other assets appearing in the monthly
9 account statements. Hence, apart from the clear notice of the
10 purchase of an annuity insurance on a monthly basis commencing in
11 August 1999 plaintiff was also alerted as to its deficient
12 performance by fall 2001.

13 Based on the foregoing, we find that at least by **August 2001**
14 there were sufficient facts available in the monthly statements to
15 alert a reasonable individual to a possible wrongdoing and trigger
16 the corresponding duty to investigate. There was clear notice of the
17 purchase of an insurance which, according to plaintiff, served no
18 useful purpose to the account holders as well as of significant
19 negative returns of the investments. The depleted condition of the
20 account was patently irreconcilable with plaintiff's instructions for
21 conservative management and for it to generate a "stable source of
22 income."

23 Simply put, the "storm warnings" were there but plaintiff failed
24 to look in that direction. Thus, we find that this action filed three
25 years after these events is untimely.
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3 CONCLUSION4 Based on the foregoing, the Motion for Summary Judgment filed by
5 MORGAN STANLEY (docket No. 10)⁵ is **GRANTED** and the complaint is hereby
6 **DISMISSED AS TIME-BARRED**.⁶7 Judgment shall be entered accordingly.⁷

8 IT IS SO ORDERED.

9 San Juan, Puerto Rico, this 27th day of February, 2006.

10 S/Raymond L. Acosta

11 RAYMOND L. ACOSTA
12 United States District Judge13
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19 See also, Plaintiff's Opposition (docket No. 18); MORGAN
20 STANLEY's Reply (docket No. 21) and Plaintiff's Surreply (docket No.
24).21 The Motion to Join filed by codefendant RAUL BENAVIDES (docket
22 No. 14) is **GRANTED**.23 In the alternative, defendant moved the court to order the
24 parties to proceed to arbitration which plaintiff has failed to
25 oppose. Pursuant to the clear terms of their Agreement it is evident
26 that the parties to this action consented to arbitrate the issues
presented in this litigation. Municipality of San Juan v. Corporacion
para el Fomento Economico de la Ciudad Capital, 415 F.3d 145, 149 (1st
Cir. 2005). Thus, the court would have so ruled had the claims
survived the limitations defense.